SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable James P. Kleinberg Presiding

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COMPLEX CIVIL LITIGATION TENTATIVE RULINGS
DATE: AUGUST 2, 2013 TIME: 9 A.M.
PREVAILING PARTY SHALL PREPARE THE ORDER

(SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	110CV178283	County of Monterey, et al. v. Nova Partners, Inc., et al.	Click on LINE 1 for ruling
LINE 2	111CV202403	In Re Advanced Analogic Technologies, Inc. Shareholder Litigation	Click on LINE 2 for ruling
LINE 3	112CV231541	Gordon v. Symantec Corporation, et al.	Click on LINE 3 for ruling
LINE 4	112CV237054	Fundamental Partners v. Berg, et al.	Click on LINE 4 for ruling

Calendar line 1

Case Name: *County of Monterey vs. Nova Partners, at al.*
Case No.: 1-10-CV-178283

The underlying action arises out of a construction project at the North Wing of the Monterey County Courthouse in Salinas, California involving the removal and abatement of asbestos, followed by seismic retrofitting. The County of Monterey ("Monterey") brought suit against defendants Nova Partners, Inc. ("Nova") and Skanska Building USA, Inc. ("Skanska"), alleging mismanagement that resulted in substantial delays and related damages resulting from the alleged release of asbestos. Nova and Skanska filed cross-complaints against LVI Environmental Services ("LVI"), Environmental Systems, Inc. ("ESI"), and ATC Associates, Inc. ("ATC") seeking indemnity and contribution. Monterey did not name LVI, ESI, or ATC in its original complaint and did not make any claims against the cross-defendants at any point in the litigation. LVI, ESI, and ATC then negotiated and settled directly with Monterey. The Court granted motions for determination of good faith settlement for LVI, ESI, and ATC, which extinguished all of Nova and Skanska's claims for equitable indemnity and contribution against those cross-defendants.

The motions currently before the Court concern memoranda of costs filed by LVI, ESI, and ATC. Nova and Skanska have both brought motions to strike the memoranda of costs, or, in the alternative, to tax certain portions of the memoranda. Nova and Skanska argue that LVI, ESI, and ATC are not entitled to recover costs because they are not prevailing parties as defined in Code of Civil Procedure section 1032. In response, LVI, ESI, and ATC argue that they meet the requirements of Section 1032 as defendants in whose favor dismissals were entered.

Legal Standards

Code of Civil Procedure section 1032, subdivision (b) provides: "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." The statute defines "prevailing party" as:

> [T]he party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the "prevailing party" shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not.

(Code Civ. Proc., § 1032, subd. (a)(4).)

With respect to good faith settlement, Code of Civil Procedure section 877 establishes:

> Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, it shall…reduce the claims against the others in the

> amount stipulated by the release, the dismissal or the covenant…[and] discharge the party to whom it is given from all liability for any contribution to any other parties.

(Code Civ. Proc., § 877, subds. (a) & (b).) Therefore, "[w]hile a good faith settlement cuts off the right of other defendants to seek contribution or comparative indemnity from the settling defendant, the nonsettling defendants obtain in return a reduction in their ultimate liability to the plaintiff." (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 872.)

"Prevailing Party"

LVI, ESI, and ATC fall within the definition of a "prevailing party" in the plain language of Code of Civil Procedure section 1032, subdivision (a)(4) as "defendant[s] in whose favor a dismissal is entered." Nova argues that LVI and ESI were not prevailing parties despite fitting within the statutory language of Section 1032 because their good faith settlements with Monterey directly diminish Nova's potential total liability. Skanska similarly argues that LVI, ESI, and ATC are not prevailing parties because their good faith settlements will offset any claim that Monterey may have against Skanska.

Both *Great Western Bank v. Converse Consultants, Inc.* (1997) 58 Cal.App.4th 609 and *Crib Retaining Walls, Inc. v. NBS/Lowry, Inc.* (1996) 47 Cal.App.4th 886 involved cross-defendants who settled directly with the plaintiff and obtained determinations of good faith settlement. In both cases, the defendant/cross-complainants' indemnity cross-complaints were then dismissed and the cross-defendants were awarded costs as the prevailing party. (*Great Western Bank, supra,* 58 Cal.App.4th at p. 612; *Crib Retaining Walls, supra,* 47 Cal.App.4th at p. 890.) Nova and Skanska argue these cases are distinguishable because there, the cross-defendants' settlement offers had been turned down by the cross-complainant before they settled with the plaintiff, whereas here, LVI, ESI, and ATC never offered to settle with the Nova and Skanska.

However, this point of distinction is not dispositive. The court in *Great Western Bank* states:

> The language of Code of Civil Procedure section 1032 is clear and unambiguous. Thus, one should not read into the statute allowing costs a restriction which has not been placed there. A court should be cautious in engrafting exceptions onto the clear language of Code of Civil Procedure section 1032. There is no evidence of a legislative intent to exclude . . . costs for judgments resulting from settlement.

(*Great Western Bank, supra,* 58 Cal.App.4th at pp. 613-614, quoting from *Crib Retaining Walls, supra,* 47 Cal.App.4th at p. 890.) Further, the court in *Crib Retaining Walls* specifies that it did not find "any statute or other authority that grants a trial court discretion to deny costs otherwise recoverable under section 1032 to a 'prevailing party' because the dismissal was the result of a section 877.6 order approving a good faith settlement." (*Crib Retaining Walls, supra,* 47 Cal.App.4th at p. 890.) Thus, despite the fact that LVI, ESI and ATC did not offer to settle with Nova and Skanska prior to settling with Plaintiff Monterey, the controlling cases clearly hold that exceptions to the plain language of section 1032 should not be created.

In *City of Long Beach v. Stevedoring Services of America* (2007) 157 Cal.App.4th 672, the appellate court affirmed the costs awarded to the cross-defendant as a prevailing party because

judgment on the underlying complaint was found in favor of the cross-complainant, and the cross-complaint for equitable indemnity was then dismissed as moot. Nova distinguishes this case on the basis that unlike *City of Long Beach*, Nova has achieved its overarching objective in its cross-complaints against LVI and ESI for equitable indemnity, whereas the cross-complainant in *City of Long Beach* never achieved its litigation objective because it was dismissed as moot. However, the court in *City of Long Beach* awarded costs to cross-defendant in spite of the fact that the cross-complaint was dismissed as moot, not because it was dismissed on that basis. The disposition of *City of Long Beach* hinged on the court's refusal to create an exception:

> There is no exception in the cost statute for dismissals of cross-complaints obtained on the ground that the cross-complaint has become moot. When a cross-complaint is dismissed as moot, the cross-defendant is one in whose favor the cross-complaint was dismissed and is therefore a prevailing party under Code of Civil Procedure section 1032 entitled to costs as a matter of right.

(*Id.* at p. 680.) This case further reinforces the principle that when a prevailing party clearly falls within the language of Section 1032, as the cross-defendants do here, exceptions should not be made for failing to make settlement offers to Nova and Skanska.

Skanska additionally argues that it is a party that qualifies as "prevailing" under Code of Civil Procedure section 1032, subdivision (a)(4) because any potential liability it may have to Plaintiff will be reduced by the settlement amount. However, because this only reduces the amount of money Skanska may have to pay to Plaintiff and does not create any sort of monetary gain for Skanska, it cannot be a net economic benefit.

For the reasons above, the Court finds that LVI, ESI, and ATC fall are "prevailing parties" for purposes of Code of Civil Procedure section 1032.

<u>Taxation of Costs</u>

"In ruling on a motion to tax costs, the trial court's first determination is whether the statute expressly allows a particular item and whether it appears proper on its face." (*Corman, et al, v. Tassajara Dev. Corp., et al* (2009) 178 Cal.App.4th 44, 71, quoting *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131.) Items expressly allowed as costs under Code of Civil Procedure section 1033.5 include filing and motion fees (subd., (a)(1)), fees for service of process (subd. (a)(4)), and costs for taking and transcribing 'necessary' depositions (subd. (a)(3)). Any award of costs must be "reasonably necessary to the conduct of litigation rather than merely convenient or beneficial to its preparation." (Code Civ. Proc., § 1033.5, subd. (c)(2).)

As its initial burden, the party seeking costs need only submit a memorandum of costs with a statement by the attorney verifying that the costs claimed are correct and necessarily incurred in the case. The party need not attach copies of bills, invoices, and so forth. (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1267; Cal. Rule of Court, rule 3.1700(a)(1).) "If the items appear to be proper charges, the verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the [prevailing party],

and the burden of showing that an item is not properly chargeable or is unreasonable is on the objecting party." (*Nelson*, *supra*, 72 Cal.App.4th at p. 131.)

"Conclusory assertions that a particular cost was not 'reasonably necessary' or 'reasonable in amount' are insufficient to rebut the prima facie showing [that the costs were reasonable and necessary]." (*Jones, supra,* 63 Cal.App.4th at p. 1266.) "[I]t is not enough for the losing party to attack submitted costs by arguing that he thinks the costs were not necessary or reasonable. Rather the losing party has the burden to present evidence and prove that the claimed costs are not recoverable." (*Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557.)

Nova's Motions to Tax

Nova brings motions against LVI and ESI, seeking very generally to tax items from the memoranda of costs provided by the parties "as the court deems fit."

Analysis: Nova offers no objections to specific items listed on either memorandum. Further, Nova fails to establish any basis for any particular item falling outside of the scope of what is reasonably necessary to the conduct of litigation. LVI and ESI both provided prima facie evidence of reasonable necessity when submitting verified memoranda of costs, meaning the burden shifted to Nova to show what, if any, costs were unreasonable. Nova has failed to provide a requested amount to be taxed. Consequently, Nova has not met its burden, and Nova's motions to tax against LVI and ESI are **DENIED**.

Skanska's Motion to Tax Against LVI

Skanska requests that filing fees, court reporter fees, and apportion of arbitrators fees (totaling $2,069.95) be taxed from LVI's memorandum of costs. In support of its request, Skanska contends that the original memorandum did not specify what these costs were for. Specifically, Skanska argues that there was no designation as to the specific item or hearing the court reporter reported on, that the arbitration fee is not appropriate because there was no arbitration at all, and that there was no breakdown of what documents were filed that totaled the $1,209 amount listed as filing fees.

In response, LVI argues that it submitted an amended memorandum of costs which clarifies what these costs were for and that Skanska has not met its burden of proving that the costs were unreasonable.

Analysis: LVI's amended memorandum of costs, submitted on July 15, 2013, was patently untimely (Cal. Rules of Court, rule 3.1700(a)(1) [15 days after mailing of entry of dismissal]), meaning the Court is left to consider the original memorandum. No break-down of how the costs would be allocated was originally provided for the challenged sections. Consequently, LSI did not initially provide enough information for these designations to be considered reasonably necessary to the conduct of litigation. Thus, Skanska's motion to tax $2,069.95 from LVI's original memorandum of costs is **GRANTED**.

Skanska's Motion to Tax Against ESI

Skanska requests that filing fees, jury fees, deposition transcript requests and certain costs designated as "other" (a grand total of $7,063.48) be taxed from ESI's memorandum of costs. In support of its request, Skanska argues that the filing fees ($607.00) appear to be fees paid to GloTrans[1] for the e-filing of certain motions and other documents. Further, Skanska suggests that because the case never went to trial, jury fees ($169) are inappropriate because there was never a jury. Skanska also contends that the deposition transcripts acquired by ESI ($5,511.55) were from a previous case and that no authority expressly permits recovering costs for such depositions. Finally, Skanska argues that the special master's fee are not explicitly mentioned in Civil Code of Procedure section 1033.5, and that the other costs under the "other" category are akin to the cost of postage (combined subtotal of $775.93).

In response, ESI argues that this Court has a contract with GloTrans which requires that all documents be e-filed through that service, meaning the fees paid are necessary in order to file the document with the Court. ESI also contends that the jury fees were paid to preserve the right to a trial by jury. In addressing the costs of deposition transcripts, ESI argues that a pre-trial order stated that all depositions taken in a previously consolidated action were deemed as taken in this case, meaning ESI's obtaining some of those transcripts to review them for this case,[2] was reasonably necessary. Finally, ESI suggest that the special master's fees are recoverable because they were reasonably necessary for the conduct of court-ordered activities with the Special Master.

ESI has also filed an amended memorandum of costs, which adds certain costs and deletes a duplicative listing of jury fees. Skanska argues that this amended memorandum is patently untimely.

Analysis: Regarding filing fees to GloTrans, as ESI correctly notes when citing to Santa Clara Superior Court's Electronic Filing and Service Standing Order, in order to file any document with this Court a party must use GloTrans to e-file the document. This exceeds the reasonably necessary standard, but it is explicitly necessary to pay fees to GloTrans to conduct this litigation. Consequently, Skanska has not met its burden with respect to filing fees.

Skanska's argument concerning jury fees is without merit. At no time does Skanska suggest that recovering a fee to preserve the right to a jury trial, which is required to be paid prior to the first case management conference, falls outside of the realm of what is reasonably necessary. Skanska, therefore, has not met its burden with respect to jury fees.

The necessity for a deposition and for the related expenditures is a question for the trial court's sound discretion. (*County of Kern v. Ginn* (1983) 146 Cal.App.3d 1107, 1113.) "As to the items for taking depositions, they are proper disbursements to put into a cost-bill, unless it be shown that they were unnecessary, or that for some special reason they should not be allowed." *Lindy v. McChesney* (1903) 141 Cal. 351, 353), Matthew Bender, *California Deposition and Discovery Practice* (2013), § 50.42. After citing general outlines concerning the recoverability of deposition costs, Skanska's argument has little substance. Skanska only includes the short statement: "ESI seeks the cost of obtaining copies of the transcripts of depositions taken in a prior related case. There is no authority that such costs are recoverable in a later action."

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[1] The Court's third-party service provider for the complex civil unit for the Court's electronic filing and service website.

[2] ESI was brought into the other case after the depositions had been taken

(Skanska's Motion against ESI, 9:14-15.) This does not attack ESI's prima facie evidence of "reasonable necessity" in the conduct of this litigation. Skanska does not argue that the potential evidence contained within the deposition transcripts is irrelevant or that it would fall outside the recoverable costs standard. Skanska, therefore, has not met its burden with respect to its challenge to deposition transcript costs.

Although not expressly allowed or disallowed as costs under Code of Civil Procedure section 1033.5, special master fees are allowable as costs within the Court's discretion. *Winston Square HOA v. Centex West, Inc.* (1898) 213 Cal.App.3d 282, 292-93, Matthew Bender *California Civil Discovery* (2013) § 2.43. As the court in *Winston Square* reasoned, when a special master is appointed by the court, his or her fee is analogous to the award of fees of court-ordered expert witnesses which are first apportioned and charged to the parties, and then the prevailing part's share is allowed as an item of costs. ESI was the prevailing party, and the special master was appointed by the Court. Consequently, Skanska has not met its burden with respect to special master fees.

ESI's amended memorandum of costs was patently untimely, meaning this Court is left to consider the original memorandum. Consequently, the jury fee included under category 1 at page 4, line 16 of ESI's original memorandum is duplicative and shall be taxed. Further, the costs added in the amended memorandum shall not be awarded.

Skanska's motion to tax is **GRANTED IN PART** as to the duplicative jury fee in the original cost memorandum. In addition, additional costs in the late-filed amended memorandum shall not be awarded and the motion is **GRANTED IN PART**.

Skanska's Motion to Tax Against ATC

Skanska requests that filing fees ($314), jury fees ($169), and the service fee of Mr. Diel ($133.70) be taxed from ATC's memorandum of costs. In supporting its request, Skanska argues that the filing fees for electronic service were not reasonably necessary because "filing fees" should only contain fees paid directly to the court. Additionally, Skanska contends that the jury fees were improper because the case never went to trial (meaning there was never a jury impaneled), and that there is no indication that the service of process to Mr. Diel was reasonably necessary to the conduct of litigation.

In opposition to Skanska's challenge to filing fees, ATC argues that the statute's plain language allows for the collection of filing fees under a prevailing party's costs, and that the $314 claimed is both reasonable and necessary because it was for electronic filing fees and the parties had agreed to electronic service of all documents in the case. In response to Skanska's challenge to jury fees, ATC contends that Skanska has not met its burden because it has failed to cite to any authority that suggests that the initial jury fee paid by ATC is not a recoverable "jury fee" under the statute. In response to Skanska's challenge to the service of process cost, ATC argues that Skanska has made only conclusory statements concerning the unreasonableness of the cost, which is not enough to meet its burden under *Seever, supra.*

Skanska's reply adds no additional arguments concerning the initial items sought to be taxed, but does argue that the amended memorandum of costs – which adds additional costs and increases the total sought – was patently untimely and was filed without seeking leave of court.

Analysis: Regarding filing fees, Skanska provides only conclusory statements concerning the unreasonable nature of the filing fees in question, arguing that the fees appear to be for electronic service of the documents referenced and that it seems readily apparent that "filing fees" only pertains to fees paid directly to the court. At no time does Skanksa provide any suggestion as to why fees paid for the electronic service of motions and other court filings, which was the method apparently agreed on by both parties,[3] was unnecessary for the conduct of the litigation. Skanska, therefore, has failed to meet its burden with respect to the unreasonable nature of the filing fees and in that regard the motion is **DENIED**.

As discussed above with regard to Skanska's motion against ESI, Skanska's argument concerning jury fees is without merit and is **DENIED**.

Regarding service of process of Mr. Diel, Skanska fails to provide specific reasons as to why recovering costs for the service of process to Mr. Diel was unreasonable. Instead, Skanska simply argues that "[t]here is no indication that whatever was served Diel was necessary to ATC's conduct of the litigation."[4] However, a memorandum of costs with a statement by the attorney verifying that the costs claimed are correct and necessarily incurred represents prima facie evidence of the costs' reasonable necessity, and Skanska fails to rebut the prima facie by showing the claimed costs are not recoverable.

Skanska is correct that no leave of court was sought for the amended memorandum of costs and that no costs added in the amended memorandum should be considered. A significant amount of time passed between the original filing and the filing of the amended memorandum, and without seeking leave to amend its memorandum ATC's amended memorandum of costs is untimely. Consequently, any costs added in the amended memorandum should be ignored.

Skanska's motion to tax is **DENIED** as to the original memorandum. However, additional costs in the amended memorandum shall not be awarded and in that regard the motion is **GRANTED**.

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[3] See ATC's Opposition, 9: 16-17.
[4] Skanska's Motion against ATC, 8:6-7.

Calendar line 2

Case Name: *In re Advanced Analogic Technologies Inc. Shareholder Litigation.*
Case No.: 1-11-CV-202403

This is a class action by Chad Venette and Stephen Bushansky ("Plaintiffs") on behalf of the shareholders of defendant Advanced Analogic Technologies Incorporated ("AATI") against Skyworks Solutions, Inc. ("Skyworks"), AATI, and certain officers and directors of AATI including Samuel J. Anderson ("Anderson"), Jason L. Carlson ("Carlson"), Jaff Lin ("Lin"), Thomas P. Redfern ("Redfern"), Chandramohan Subramaniam ("Subramaniam"), and Richard K. Williams ("Williams") (the "Individual Defendants") (collectively "Defendants") for breaching fiduciary duties and/or aiding and abetting those breaches in connection with the sale of AATI to Skyworks for inadequate consideration and on unfair terms.[5]

Plaintiffs allege the process over the Skyworks-AATI merger was driven by the desire of AATI insiders to secure material benefits for themselves, including immediate vesting of existing equity awards and new grants of restricted stock. Skyworks' original offer as of March 3, 2011 stood at $7.35 per share,[6] but was revised downward at various times to $6.30 in April of 2011,[7] and $6.13 in May of 2011.[8] On May 26, 2011, the Board approve the acquisition of Skyworks at $6.13 per share, and formally awarded restricted stock units ("RSUs") to "'the key officers, directors, and employees [purportedly] in connection with their efforts in negotiating the terms of the Merger and Merger Agreement,' resolving further '[t]hat the RSUs shall accelerate 100% upon a change of control of the Company.' These RSUs included 240,000 shares to Anderson, 260,000 shares to Williams, and 60,000 shares to Lin."[9] On November 30, 2011, Skyworks and AATI announced that they had entered into a definitive agreement whereby Skyworks would acquire all of AATI's common stock for the price of $5.80 per share, and the merger was completed on January 10, 2012.[10]

The original Consolidated Amended Complaint ("CAC") was filed on April 20, 2012, and asserted two causes of action for: (1) breach of fiduciary duties (against the Individual Defendants); and (2) aiding and abetting the Individual Defendants' breaches of fiduciary duty (against Skyworks and AATI).

On or about February 15, 2013, the Court sustained Defendants' demurrers to the CAC with leave to amend. The Court held that Plaintiffs failed to sufficiently allege facts to support a breach of the Individual Defendants' *Revlon* duties in light of their receipt of a fairness opinion from Needham & Company, LLC ("Needham"), and Plaintiffs failed to allege the materiality of allegedly omitted facts from the Needham fairness opinion. Regarding allegations that Anderson "stacked" the AATI Board with individuals with whom he held longstanding business affiliations, the Court held that allegations of mere friendships or outside business relationships, standing alone, were insufficient to raise a reasonable doubt the directors' independence. Regarding the allegations that RSUs held by Anderson and Williams would vest immediately upon acquisition with Skyworks, and that Anderson, Williams and Lin would

[5] SACC ¶ 1.
[6] SACC ¶ 31.
[7] SACC ¶ 32.
[8] SACC ¶ 44.
[9] SACC ¶ 47, alteration in original.
[10] CAC ¶ 3.

receive additional new grants of RSUs upon completion of the merger, the Court held that these were insufficient to raise a reasonable doubt about these directors' disinterestedness because their interests were still aligned with the shareholders to obtain the highest price. Regarding the allegations of insufficient disclosures in AATI's Schedule 14D-9, the Court held that a disclosure claim was no longer viable because the merger was complete. Finally, the Court held that because the predicate breach of fiduciary duty claim against the Individual Defendants failed, the aiding and abetting claim against AATI and Skyworks also failed.

On March 4, 2013, Plaintiffs filed their Second Amended Consolidated Complaint ("SACC").

The Individual Defendants demur to the breach of fiduciary claim. AATI and Skyworks separately demur to the aiding and abetting claim.

Sealing

On March 4, 2013, Plaintiffs filed a redacted version of the SACC and lodged an unredacted version conditionally under seal. No motion to seal the unredacted SACC has been filed. "A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties." (Cal. Rules of Court, rule 2.551(a).) It is unclear if Plaintiffs intended to put the onus on Defendants to move to seal. If so, however, Plaintiffs never filed a written notice of lodgment pursuant to California Rules of Court, rule 2.551(b)(3)(A)(iii.)

As of this tentative order, it is the Court's intention to place the unredacted SACC into the public file unless one or both of the parties promptly files a motion to seal.

Judicial Notice

Defendants request judicial notice of: (1) Amended Complaint for Breach of Fiduciary Duties, *Venette v. Advanced Analogic Technologies, Inc.*, Case No. 1-11-CV-202501, filed in this Court on July 14, 2011; (2) the CAC filed in this action on April 20, 2012; (3) AATI's Schedule 14D-0, filed with the Securities and Exchange Commission ("SEC") on December 9, 2011; (4) Amendment No. 1 to AATI's Schedule 14D-9, filed with the SEC on December 23, 2011; (5) Amendment No. 2 to AATI's Schedule 14D-9, filed with the SEC on January 4, 2012; (6) excerpts from a report containing the high, low and closing historical stock prices of AATI common stock as traded on NASDAQ on May 25, 2011; and (7) excerpts from a report containing the high, low and closing historical stock prices of AATI common stock as traded on NASDAQ on November 29, 2011.[11]

Plaintiffs oppose the request as to the Schedule 14D-9 and Amendments Nos. 1 and 2 to the Schedule 14D-9 (Moreno Exhs. C, D, and E) on the ground that Defendants offer the filings to introduce new and disputed facts to contradict the allegations in the SACC.

The request is **GRANTED** as to the existence (but not the truth of the contents) of the *Venette* Amended Complaint and CAC (Evid. Code, § 452, subd. (d)) and the publicly-filed SEC documents (*StorMedia Inc. v. Sup. Ct.* (1999) 20 Cal.4th 449, 456-457 [judicial notice of proxy

[11] All of the records in the request are attached as exhibits to the Declaration of Catherine E. Moreno ISO AATI's Demurrer to the SACC.

statement and registration statement filed with SEC]; Evid. Code § 452, subd. (h) [facts not reasonably in dispute]), as well as the historical stock prices of AATI (Evid. Code, § 452, subd. (h); *In re Marriage of Brigden* (1978) 80 Cal.App.3d 380, 385, fn. 3.)

Parties' Arguments

The Individual Defendants argue the SACC still fails to allege sufficient facts demonstrating that a majority of the Board was materially interested in the merger because despite characterizing the RSU grants at issue as different from ordinary stock option grants, the SACC concedes they functioned the same way as option grants (the higher the deal price, the more money the directors received), and therefore, Anderson, Williams and Lin were still aligned with the shareholders to obtain the highest price possible for AATI. The Individual Defendants further argue that the SACC's allegations fail to demonstrate the materiality of the RSU grants to the directors' personal economic circumstances, since with respect to Williams, the $2.67 million in value he received from the RSU grant could not have outweighed his interest in $18 million in pre-sale holdings, and with respect to Anderson and Lin, Plaintiffs fail to allege facts about their personal economic circumstances other than comparing the RSU grant amounts to their yearly compensation (without contending they have other sources of compensation). As for the SACC's allegations regarding the sales process (e.g., the Needham fairness opinion, proposed transactions with other companies like IceMos and Dialectic, and the disclosures in the Schedule 14D-9), the Individual Defendants argue the Court has already held that they did not form a basis for a claim of breach of fiduciary duty.

Plaintiffs argue the SACC adequately pleads that Anderson, Williams and Lin were interested in the transaction because, by receiving these "unprecedented" RSU grants that would have substantially increased their pre-sale holdings, these directors were incentivized to complete the merger with Skyworks at any price, since even at the $5.80 price, they were not net negatively affected by the price reduction. Thus, Plaintiffs argue that the interests of Anderson, Williams and Lin were not aligned with those of the AATI shareholders in generally maximizing the offer price. With regard to materiality, Plaintiffs argue the Individual Defendants produced no information regarding the personal economic worth or income of its directors beyond what is publicly available. Finally, Plaintiffs argue the SACC's allegations regarding the flawed sales process demonstrate the entire Board acted in bad faith by consciously disregarding its duty to seek the highest value reasonably available for the company's shareholders, awarding the RSUs, and giving the most conflicted members chief price negotiating responsibilities.

Discussion

As a threshold matter, because AATI is a Delaware corporation,[12] Delaware law should apply. In general, disputes regarding the internal affairs of a corporation are governed by the state of incorporation. (*State Farm Mutual Automobile Ins. Co. v. Superior Court* (2003) 114 Cal.App.4th 434, 442.) The internal affairs of a corporation include "mergers, consolidations and reorganizations and the reclassification of shares." (Rest.2d, Conflict of Laws, § 302, com. (a); *Kamen v. Kemper Fin. Servs*. (1991) 500 U.S. 90, 101.)

[12] SACC ¶ 14.

“Under Delaware law, courts apply a presumption that directors of corporations act ‘independently, with due care, in good faith and in the honest belief that [their] actions were in the stockholders’ best interests.’ This presumption, the ‘business judgment rule,’ is ‘[a]t the foundation’ and ‘[a]t the core of Delaware corporate law.’ . . . . ‘[W]here business judgment rule presumptions are applicable, the board’s decision will be upheld unless it cannot be “attributed to any rational business purpose.”’ [¶] However, where a transaction constitutes a ‘change in corporate control,’ ‘*Revlon* duties’ refocus the board’s traditional fiduciary duties and require it to try in good faith to ‘seek the best value reasonably available to the stockholders.’ Where the duty under *Revlon* applies, the Court’s ordinarily deferential ‘rational basis’ review gives way to an objective ‘reasonableness’ standard of review, both to the process and the result, under which the Court evaluates whether the board has complied with its fundamental fiduciary duties.” (*Binks v. DSL.net, Inc.*, 2010 Del. Ch. LEXIS 98, at *20-21, internal citations omitted.)

Nevertheless, “in the wake of *Revlon,* Delaware courts have made clear that the enhanced judicial review *Revlon* requires is not a license for law-trained courts to second-guess reasonable, but debatable, tactical choices that directors have made in good faith. For example, the Supreme Court has held that the duty to take reasonable steps to secure the highest immediately available price does not invariably require a board to conduct an auction process or even a targeted market canvass in the first instance, emphasizing that there is ‘no single blue-print’ for fulfilling the duty to maximize value.” (*In re Toys “R” Us, Inc. S’holder Litig.* (Del. Ch. 2005) 877 A.2d 975, 1000.)

“As a general matter, the business judgment rule presumption that a board acted loyally can be rebutted by alleging facts which, if accepted as true, establish that the *board* was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders. To establish that a *board* was interested or lacked independence, a plaintiff must allege facts as to the interest and lack of independence of the *individual members* of that board. To rebut successfully business judgment presumptions in this manner, thereby leading to the application of the entire fairness standard, a plaintiff must normally plead facts demonstrating ‘that a *majority* of the director defendants have a financial interest in the transaction or were dominated or controlled by a materially interested director.’” (*Orman v. Cullman* (Del. Ch. 2002) 794 A.2d 5, 22-23, footnotes omitted.)

“In the context of a sales process, a plaintiff can plead that a board breached its duty of loyalty by alleging non-conclusory facts, which suggest that a majority of the board either was interested in the sales process or acted in bad faith in conducting the sales process. ‘A director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders.’ A director acts in bad faith where he or she ‘intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his [or her] duties.’” (*In re Answers Corp. S’holder Litig.*, 2012 Del. Ch. LEXIS 76, at *21.)

Here, the SACC focuses on three of the six members of the AATI Board – Anderson, Williams, and Lin – as being personally interested in the Skyworks merger based on acquisition-related inducements made to them. Plaintiffs do not allege non-conclusory facts suggesting the interestedness of Carlson, Redfern, or Subramaniam in the Skyworks merger.

As this Court previously recognized, "[t]he accelerated vesting of options does not create a conflict of interest because the interests of the shareholders and directors are aligned in obtaining the highest price." (*In re Openlane, Inc. S'holders Litig.*, 2011 Del. Ch. LEXIS 156, *15, fn. 17.) The SACC adds detailed allegations regarding the grant of new RSUs to Anderson (240,000 shares), Williams (460,000 shares) and Lin (60,000 shares) on May 26, 2011.[13] However, by itself, this distinction between accelerated vesting of RSUs and new grants of RSUs does not change the fact that the grantees' interests were still aligned with the AATI shareholders to obtain the highest price for AATI shares, particularly for grantees like Anderson and Williams who had significant pre-sale holdings in AATI. (See *In re Openlane*, *supra*, at *55-56.) In *Wayne Cnty. Emps.' Ret. Sys. v. Corti* (Del. Ch. 2009) 2009 Del. Ch. LEXIS 126, the Delaware Chancery Court found that grants of over 300,000 RSUs to two directors in connection with a challenged merger did not rebut the presumption that the members of the compensation committee exercised their independent and disinterested business judgment in approving the employment agreements that conferred these benefits. (See *Wayne Cnty*, *supra*, at *21-22, fn. 21, *40-41.) The Chancery Court observed that the two directors "owned approximately 7.5% of Activision's stock, which gave [them] an incentive to obtain a higher price for Activision shares." (*Id.* at *41.) The same holds true here.[14]

Nor do Plaintiffs allege facts to rebut the presumption that the rest of the AATI Board exercised independent and disinterested business judgment in approving the RSU grants. The SACC alleges the Board hired Compensia to evaluate the payments to Williams, Anderson and Lin, and on April 28, 2011, Compensia gave a presentation to the Board and observed that the "transaction-related fees" were "uncommon" and that "Compensation to Board members can affect the business judgment rule and expose directors to personal liability, especially in the context of a change of control."[15] At a May 18, 2011 meeting, the Board decided not to pay Williams a cash payment, but decided to increase to 475,000 shares the proposed RSU grant to Williams in consideration of his non-competition agreement.[16] Later, Anderson's $950,000 cash payment was dropped, and Williams reduced his payment by 75,000 RSUs, but he was awarded an additional 60,000 RSUs in connection with his rule in facilitating the transaction with Skyworks.[17] Plaintiffs do not point to any particular wrongdoing on the part of the Board in approving these amounts, other than suggesting it was wrong to do so in light of

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[13] SACC ¶ 47.
[14] The Court also highlights the Individual Defendants' point that the RSUs were granted "in connection with [Anderson, Williams and Lin's] efforts in negotiating the terms of the Merger and the Merger Agreement" (SACC ¶ 47), and according the Schedule 14D-9, the RSUs would vest over a four-year period, with one-fourth vesting on the one year anniversary of the grant, and 6.25% vesting every quarter thereafter, with 100% acceleration upon a change of control. (See SC 14D-9 at 4-5, Exh. C to RJN.) This tends to belie Plaintiffs' argument that the RSUs gave the directors a personal incentive to complete with merger at any price, since if they believed AATI was worth more than Skyworks' offer, they would have the incentive to hold their shares until the RSUs vested. As discussed above, Plaintiffs have opposed the request for judicial notice of the Schedule 14D-9 on the ground that the Individual Defendants seek to introduce disputed facts. On a demurrer, the Court may "consider material documents referred to in the allegations of the complaint. [Citation.]" (*City of Port Hueneme v. Oxnard Harbor Dist.* (2007) 146 Cal.App.4th 511, 514.) Although Plaintiffs allege various deficiencies in the 14D-9 (SACC ¶¶ 101 [no basis for price reduction or details of arbitration]; 102 [no details of bases for Skyworks' breach notice or D'Angelo demand]; 103 [no information about whether lower offer was fair, no financial valuation or fairness opinion from Needham]; 105 [no management presentations, only vague business reasons for agreeing to lower price]; 106 [no range of values for the company]), Plaintiffs do not allege that the terms of the RSU grants were inaccurate.
[15] SACC ¶¶ 36-37.
[16] SACC ¶ 41.
[17] SACC ¶¶ 41-46.

Compensia's presentation. However, there are no convincing factual allegations suggesting that the remainder of the Board was dominated or controlled by Anderson, Williams and/or Lin in approving the RSU grants.

The SACC's main charge against the Board as a whole is in placing the sales process in the hands of Anderson and Williams.[18] However, this presumes Anderson and Williams were conflicted due to the RSU grants, but as discussed above, their interests were still aligned with the AATI shareholders to obtain the highest price for AATI shares. "While a board cannot completely abdicate its role in a change of control transaction, Delaware law is clear that in certain circumstances it is appropriate for a board to enlist the efforts of management in negotiating a sale of control." (*Wayne Cnty., supra,* at *46-47.) The lack of a "debilitating conflict of interest in the transaction[]… undermines a key premise of [Plaintiffs'] argument that the outside directors left the negotiations in the hands of conflicted managers." (*Ibid.*)

Plaintiffs argue the RSU grants were benefits not shared with the other AATI shareholders because Anderson, Williams and Lin stood to gain at any price, while the shareholders would not obtain a similar benefit. In the Court's mind, this novel theory relates directly to the issue of materiality. "[I]t is not enough to establish the interest of a director by alleging that he received any benefit not equally shared by the stockholders. Such benefit must be alleged to be *material* to that director. Materiality means that the alleged benefit was significant enough '*in the context of the director's economic circumstances*, as to have made it improbable that the director could perform her fiduciary duties to the . . . shareholders without being influenced by her overriding personal interest.'" (*Orman*, *supra*, 794 A.2d at p. 23, footnotes omitted, original emphasis.) For Plaintiffs to successfully allege that the RSU grants were a material benefit significant enough to Anderson, Williams and Lin to make it improbable for them to act in the shareholders' interests without being influenced, Plaintiffs must contend with the fact (admitted in the SACC) that Anderson and Williams both held significant pre-sale holdings.[19] Williams presents a particular problem for Plaintiffs' theory because by any reasonable measure, Williams' interest in maximizing the sale price for his 3,486,000 pre-sale shares would have likely far outweighed his interest in an RSU grant worth approximately $2.7 million. At the very least, it is very difficult for the Court to conclude that Williams' interest in the 460,000 RSU grant made it improbable that he could act disinterestedly, since his other interest in maximizing the sales price for his vast pre-sale holdings was fully aligned with the shareholders. Without Williams, Plaintiffs cannot allege that a majority of the directors had a financial interest in the transaction in order to rebut the presumption of the business judgment rule and allow the Court to second-guess the decisions of the AATI Board.

The SACC makes further allegations regarding the outside relationships of Anderson, Carlson, and Subramaniam with IceMos, Anderson's private company and a potential acquisition target early in the sales process with Skyworks.[20] However, these allegations do not demonstrate any interest that Carlson and Subramaniam had in the Skyworks acquisition, and as the Court previously held, allegations of mere personal friendships or outside business relationships, standing alone, are insufficient to raise a reasonable doubt about a director's independence. Nor do these allegations, when combined with the generalized allegations of "bad faith

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[18] SACC ¶ 80.
[19] SACC ¶¶ 50, 60. Lin's pre-sale holdings were not insignificant either (109,000 shares [SACC ¶ 68]), but Anderson and Williams present more compelling examples.
[20] SACC ¶¶ 75-79.

decisions throughout the sale process"[21] sufficiently demonstrate a reasonable doubt about the independence of Carlson, Subramaniam and Redfern, because, as discussed above, the lack of a conflict of interest in the transaction undermines the premise of Plaintiffs' argument that the Board implemented a flawed sales process by leaving negotiations in the hands of Anderson and Williams.

For all of these reasons, the Individual Defendants' demurrer is **SUSTAINED**. Furthermore, because Plaintiffs do not argue or show in what manner they can amend their pleading to state a sufficient claim under Delaware law, the demurrer is **SUSTAINED WITHOUT LEAVE TO AMEND**. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

Finally, because the SACC fails to state a claim for breach of fiduciary duty against the Individual Defendants, the claim that Skyworks and AATI aided and abetted any underlying breach of fiduciary duty also fails. (*Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.* (Del. Ch. 2006) 906 A.2d 168, 215.) Thus, the demurrer by Skyworks and AATI to the second cause of action for aiding and abetting is also **SUSTAINED WITHOUT LEAVE TO AMEND**.

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[21] SACC ¶¶ 74-109.

Calendar line 3

Case Name: *Natalie Gordon vs. Symantec Corporation, et al.*
Case No.: 1-12-CV-231541

This is a putative shareholder class action by plaintiff Natalie Gordon ("Plaintiff") individually and on behalf of shareholders of defendant Symantec Corporation ("Symantec") against Symantec and individual Symantec directors Stephen M. Bennett, Michael A. Brown, Frank E. Dangeard, Stephen E. Gillett, Geraldine B. Laybourne, David L. Mahoney, Robert S. Miller, Daniel H. Schulman, and V. Paul Unruh (the "Individual Defendants") (collectively "Defendants") for allegedly disseminating materially misleading and incomplete materials in an August 30, 2012 Proxy Statement filed with the Securities and Exchange Commission in connection with "Proposal 3", an advisory "say-on-pay" vote to approve executive compensation.

The original Class Action Complaint ("CAC") for breach of fiduciary duty against the Individual Defendants and aiding and abetting against Symantec was filed on September 4, 2012. On October 10, 2012, Plaintiff moved for a preliminary injunction to enjoin the October 23, 2012 shareholder vote on Proposal 3. On October 17, 2012, the motion for preliminary injunction was denied.[22]

On or about November 20, 2012, Defendants demurred to the CAC on the grounds that it failed to state sufficient facts to constitute a cause of action. On February 22, 2013, the Court sustained the demurrer with leave to amend because (1) there is no longer any direct disclosure claim available to the Symantec shareholders after the October 23, 2012 vote; (2) any suggestion of monetary harm based on excessive executive compensation would only give rise to a derivative claim; and (3) Plaintiff failed to allege how the omitted information set forth in the CAC was material under Delaware law.

On March 4, 2013, Plaintiff filed the Amended Class Action Complaint ("ACAC") for breach of fiduciary duty against the Individual Defendants and aiding and abetting against Symantec.

Defendants now demur to the ACAC on the grounds of failure to state a claim and lack of standing.

Sealing

The ACAC was filed under seal with a notice pursuant to California Rules of Court, rule 2.551(b). Under rule 2.551(b)(3)(A), if a party files, for purposes of adjudication, documents produced in discovery subject to a confidentiality, but that party does not intend to move to seal those documents, the party must still lodge them under seal, with redacted copies, and give notice to the other party that the documents will be placed in the public file unless a timely motion to seal is made. (See Cal. Rules of Court, rule 2.551(b)(3)(A).) If the party that produced the documents is given notice and fails to file a motion to seal the records within 10 days (or obtain an extension of time to file such motion), "the clerk must promptly remove all the documents…from the envelope…and place them in the public file." (See Rule 2.551(b)(3)(B).)

[22] Docket no. 35.

Here, the notice was electronically filed on the Court's website on March 4, 2013, and an electronic mail message was transmitted to all parties on the electronic service list, but Defendants did not file a motion to seal within 10 days. Thus, the ACAC shall be removed from its envelope and placed in the public court file.

Supplemental Authorities

The Court declines to consider the supplemental authorities submitted by the parties after the submission of the reply papers.

Allegations of the ACAC

Plaintiff alleges the Proxy was materially misleading because it "failed to disclose a fair summary of the advice, counsel and analyses performed and provided to the Board and/or the Compensation Committee ("the Committee") by Mercer, the Committee's compensation consultant. According to the Proxy, Mercer evaluated and advised the Compensation Committee on the peer group that the Compensation Committee uses to develop a market composite for purposes of establishing named executive officer pay levels."[23]

Plaintiff quotes a portion of the Proxy which states that in order to "'further strengthen [the Company's] pay for performance focus,' Symantec 'shifted our target pay positioning for our executive officers from the 65th percentile to the 50th percentile of the relevant market composite for salary, and are gradually shifting the percentile of the relevant market we target for the variable pay elements from the 50th percentile to the 65th percentile.'"[24] Plaintiff alleges that "[w]hile shareholders likely expect that, given the purported focus on pay for performance, such a shift would signal that Symantec's performance metrics are generally aligned with the mean or median of its peer group up to the 65th percentile of the peer group, the data reviewed by the Committee and/or the Board demonstrates otherwise. For example, according to an October 24, 2011 presentation to the Committee, Symantec's performance as defined by its return on revenue ("ROR") ranked below the 5th percentile of its peer group, ranking above only one of its 14 peers for which ROR data was available. Similarly, Symantec's return on equity ranked below the 25th percentile of its peer group. Total shareholder return ("TSR"), another performance metric that allows investors to assess the performance of their investment, was well below the peer 50th percentile of 31.1%. Symantec's one-year TSR was 9.5%. Nondisclosure of this information has the likely effect of causing shareholders to assume that Symantec's performance metrics are generally aligned with the 50th to 65th percentile of its peer group and is thus misleading. Disclosure of this information would allow shareholders to properly determine if it was appropriate, based on the relevant performance metrics, to target executive compensation between the 50th and 65th percentile. However, none of this information was disclosed to Symantec shareholders in the Proxy."[25]

Plaintiff then alleges that "three months later, Mercer presented an estimated ISS peer group to Symantec's Committee which demonstrated that Symantec ranked well below the median of

[23] ACAC ¶ 33.
[24] ACAC ¶ 33.
[25] ACAC ¶ 33.

the estimated peer group in both one-year TSR and three-year TSR. In late July, leading up to the filing of the Proxy, Mercer presented the Committee with information regarding the important effect that TSR data has on Say-on-Pay voting results. The very first page of the presentation established that 'poor absolute shareholder returns increases the likelihood of negative say on pay results' and that '[a]verage TSR and say on pay approval levels demonstrate a clear trend'. Despite this knowledge that TSR is a key metric in a shareholder's determination of how to vote, Symantec did not disclose any data regarding its TSR performance."[26]

Finally, Plaintiff quotes from the Proxy, which states that Symantec's "'general pay positioning strategy is to target the levels of base salary, annual short-term cash incentive structure and long-term incentive opportunities and benefits for our named executive officers with reference to the relative market data for each position.' It continues, adding that '[t]he peer group's proxy statements provide detailed pay data for the top five positions' and '[s]urvey data provides compensation information from a broader group of information technology companies, with positions matched based on specific job scope and responsibilities. The Compensation Committee considers data from these sources as a framework for making compensation decisions for each named executive officer's position.' This information, in conjunction with the practice of targeting executive pay discussed above would cause shareholders to believe that executive compensation is generally between the 50th and 65th percentile of its peer group. Data reviewed by the Committee proved otherwise. For example, as of February 14, 2012, Symantec's then-CEO and President was receiving total direct compensation ("TDC") above the 65th percentile. While Symantec was targeting the 50th percentile of the market's base salary, three of the five executives listed on the Company's February 14 Market Analysis Summary were receiving a base salary above the 65th percentile. Similarly, one of the five executives was receiving TDC above the 75th percentile while another's TDC was above the 90th percentile. Three of the executives were similarly receiving long term incentive compensation above the 75th percentile of Symantec's peer group. However, the Proxy does not disclose a fair summary of the peer benchmarking analyses that the Committee considered when determining Symantec's executive compensation. Without any such information, shareholders were unable to determine 1) if executive compensation was being appropriately targeted and 2) if executive salaries were properly aligned with the performance metrics described above and, as a result, were unable to cast informed votes on Proposal."[27]

Plaintiff alleges that "without the information sought [in this action], Symantec shareholders were unable to cast informed votes on executive compensation. In turn, a shareholder vote based upon incomplete and misleading information will not properly apprise the Committee of shareholders' opinions regarding executive compensation. While an informed vote may have a positive effect upon executive compensation practices moving forward, a shareholder vote based on incomplete information may have the unintended effect of establishing and/or entrenching inefficient pay practices. Because the Say-on-Pay vote has a forward-looking effect upon future executive compensation practices, the relief of supplemental disclosure and a new vote would ensure that the vote is given its intended effect, allowing for informed shareholders to voice their opinions on Symantec's executive compensation."[28]

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[26] ACAC ¶ 34.
[27] ACAC ¶ 35.
[28] ACAC ¶ 36.

Accordingly, in the ACAC's prayer for relief, Plaintiff seeks declarations certifying the class, decreeing the Proxy was issued in breach of the Individual Defendants' fiduciary duties and that Symantec aided and abetted the breaches, rescission of the prior vote on Proposal 3, and orders that Defendants issue a new, supplemented Proxy and schedule a new meeting to vote on Proposal 3.[29]

Judicial Notice

Defendants request judicial notice of: (1) Symantec's Definitive Proxy Statement, filed with the SEC on or about August 30, 2012 (Muck Exh. 1); (2) excerpts from presentation entitled "Peer Group Discussion" (Muck Exh. 3); (3) excerpts of Mercer presentation entitled "Regulatory, Governance & ISS Policy Update" (Muck Exh. 4); (4) excerpts of Mercer presentation entitled "ISS Update" (Muck Exh. 5); and (5) excerpts of materials prepared for Symantec's Compensation Committee in connection with a meeting on or about March 14, 2012 (Muck Exh. 6). The request is **GRANTED** as to Muck Exhibits 1, 3, 4, and 5. Exhibit 1 is a public document filed with the SEC. (See *StorMedia Inc. v. Sup. Ct.* (1999) 20 Cal.4th 449, 456-457 [judicial notice of proxy statement and registration statement filed with SEC]; Evid. Code § 452, subd. (h) [facts not reasonably in dispute].) Exhibits 3, 4, and 5 are quoted and/or referenced in the ACAC. On a demurrer, the Court may "consider material documents referred to in the allegations of the complaint. [Citation.]" (*City of Port Hueneme v. Oxnard Harbor Dist.* (2007) 146 Cal.App.4th 511, 514.) Plaintiff does not dispute the authenticity of these records, and they were previously submitted by Plaintiff as Bower Exhibits B, G and H in support of Plaintiff's motion for preliminary injunction. As for Muck Exhibit 6, Defendants argue that a document referred to in the ACAC is not a peer benchmarking analysis but a Hold Analysis that makes no mention of the Company's executive pay relative to the peer companies identified in the Proxy. It is not clear to the Court that paragraph 35 of the ACAC refers to any particular document, let alone the particular Hold Analysis submitted as Muck Exhibit 6. The request is **DENIED** as to Muck Exhibit 6.

Discussion[30]

Defendants again raise the point that Plaintiff has no direct disclosure claim at this stage because the vote on Proposal 3 has already occurred. As the Court previously acknowledged, judicially-noticed documents demonstrated that the shareholders approved Proposal 3 on October 23, 2012.[31] Plaintiff argues a direct remedy is not foreclosed by the shareholder vote because unlike mergers, the say-on-pay vote can be undone and supplemental disclosures provided. The Court need not delve deeply into this issue, for even if Plaintiff's disclosure claim was not irreparably foreclosed by the October 23, 2012 vote, Defendants' other challenges to the claim are well-taken for the reasons discussed below.

"To state a disclosure claim, [Plaintiff] 'must provide some basis for a court to infer that the alleged violations were material. . . . [She] must allege that facts are missing from the [Proxy]

[29] See ACAC at pp. 12-13.
[30] The parties previously agreed that Delaware law applies. Plaintiff alleges that Symantec is a Delaware corporation. (See ACAC ¶ 9.)
[31] Mar. 4, 2013 Order Sustaining Demurrer at p. 4, docket no. 53.

statement, identify those facts, state why they meet the materiality standard and how the omission caused injury.'" (*Skeen v. Jo-Ann Stores, Inc.* (Del. 2000) 750 A.2d 1170, 1173.)

Defendants argue that Plaintiff's claim suggests harm to Symantec in the form of excessive executive compensation, and thus, the claim is derivative, not direct. Plaintiff argues that the ACAC does not allege that executive compensation is excessive or unreasonable, but that Symantec's shareholders have no way of determining if Symantec's pay practices are reasonable without disclosure of further information.

To determine if a claim is direct or derivative, "a court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." (*Tooley v. Donaldson, Lufkin, & Jenrette, Inc.* (Del. 2004) 845 A.2d 1031, 1039.) "[W]here it is claimed that a duty of disclosure violation impaired the stockholders' rights to cast an informed vote, that claim is direct." (*In re J.P. Morgan Chase & Co. S'holder Litig. v. Harrison* (Del. 2006) 906 A.2d 766, 772.) "In a direct suit based upon a disclosure claim, … damages to plaintiff shareholders are limited only to those that arise logically and directly from the lack of disclosure, and nominal damages are appropriate only where the shareholder's economic or voting rights have been injured." (*In re Tyson Foods, Inc. Consol. S'holder Litig.* (Del. Ch. 2007) 919 A.2d 563, 601-602.)

Here, the ACAC alleges that an uninformed shareholder vote on Proposal 3 "may have the unintended effect of establishing and/or entrenching inefficient pay practices."[32] Any such pay practices would constitute harm or waste to Symantec, not an injury to the Symantec shareholders, and the benefit of relief in the form of a new informed vote would run to Symantec because the informed vote would prevent the establishment or entrenchment of said pay practices. "[U]nder Delaware law there is no *per se* rule that would allow damages for all director breaches of the fiduciary duty of disclosure. . . . Damages will be available only in circumstances where disclosure violations are concomitant with deprivation to stockholders' economic interests or impairment of their voting rights." (*Loudon v. Archer-Daniels-Midland Co.* (Del. 1997) 700 A.2d 135, 146-147.) Here, Plaintiff does not allege that the approval vote on Proposal 3 resulted in a deprivation of the Symantec shareholders' economic interests or impairment to their voting rights such as a reduction in voting power. (See *Noble v. AAR Corp.* (N.D. Ill. 2013) 2013 U.S. Dist. LEXIS 48075, at *16-18, citing *Loudon*, *supra*, and *In re Tyson Foods, Inc. Consol. S'holder Litig.* (Del. Ch. 2007) 919 A.2d 563, 602.) Plaintiff does not allege how any of the purported omissions caused injury to the Symantec shareholders, and only alleges the possibility of harm to Symantec.

Nevertheless, even if Plaintiff sufficiently alleged a direct disclosure claim, Plaintiff fails to sufficiently allege the materiality of the omitted information.[33] The omitted information falls into two basic categories: (1) a comparison of Symantec's performance metrics such as total shareholder return ("TSR") or return on revenue ("ROR") with that of the peer group identified

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[32] ACAC ¶ 36.
[33] Defendants also correctly point out that Plaintiff points to nothing in Item 402 of Regulation S-K of the Dodd-Frank Act that is missing from the Proxy. (See *Noble*, *supra*, 2013 U.S. LEXIS 48075, at *12-14.)

in the Proxy;[34] and (2) a fair summary of the peer benchmarking analyses that the Compensation Committee used to determine Symantec's executive compensation.[35]

"'Directors of a Delaware corporation are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action.' . . . . The Delaware Supreme Court has stated that the essential inquiry in analyzing a disclosure claim is whether the alleged omission or misrepresentation is material. . . . An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused a reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available. Directors do not need to disclose, however, all information about a particular subject, or even information that is simply helpful if it does not meet the above standard. Furthermore, because the standard requires full disclosure of all material facts, courts should assess the qualitative importance of each particular disclosure item at issue." (*In re Cogent, Inc. S'holder Litig.* (Del. Ch. 2010) 7 A.3d 487, 509, footnotes omitted.)

Regarding financial metrics like TSR and ROR, Plaintiff alleges that given the Proxy's stated focus on pay for performance, Symantec's shift of target pay positioning for executives from the 65th to the 50th percentile of the relevant market composite for salary and its accompanying shift of the percentile of the relevant market composite targeted for other performance-based pay elements from the 50th to the 65th percentile "would signal that Symantec's performance metrics are generally aligned with the mean or median of its peer group up to the 65th percentile of the peer group[.]"[36] However, the undisclosed information (Symantec's performance metrics compared to the peer group) is not inconsistent with or significantly different from the disclosed information (that target pay positioning was based on percentiles of relevant market composite for salary and other performance-based pay elements). The Proxy clearly states that pay targets were based on percentiles "of the relevant market composite for salary [and] … for other performance-based pay elements".[37] The Proxy's Compensation Discussion and Analysis pertains to Symantec's compensation policies and the compensation information of companies in the peer group,[38] and none of this compensation-related information is rendered materially misleading by omission of information about the financial performance of Symantec or the other companies in the peer group.

In the next paragraph of the ACAC, Plaintiff alleges that TSR is a key metric in a shareholder's determination of how to vote, as evidenced by a presentation made by Mercer in or around January of 2012 to the Symantec Compensation Committee regarding an estimated ISS peer group, which demonstrated that Symantec ranked well below the median of the estimated peer

[34] ACAC ¶¶ 33-34.
[35] ACAC ¶ 35.
[36] ACAC ¶ 33.
[37] See Proxy at 34, Muck Exh. 1.
[38] See Proxy at 34-41.

group in both one-year and three-year TSR.[39] Plaintiff quotes portions of the Mercer presentation stating that "poor absolute shareholder returns increases the likelihood of negative say on pay results" and "[a]verage TSR and say on pay approval levels demonstrate a clear trend".[40] Plaintiff alleges Defendants had a duty to disclose that Symantec's TSR ranked well below the median of Mercer's estimated ISS peer group.

Defendants submit portions of the Mercer presentation slides referred to in the ACAC.[41] According the presentation slides, Mercer did not know what companies ISS would actually use in its peer group.[42] Notably, the presentation slides show that based on Mercer's estimated ISS peer group, Symantec was expected to be a "low concern level across all three of ISS' tests".[43] In the Court's view, it is not substantially likely that information which did not raise more than a low level of concern for the Committee would alter the total mix of information for Symantec's shareholders. Symantec's directors were not required to disclose all of the information they considered. The portions of the Mercer presentation quoted in the ACAC regarding a "clear trend" between TSR and negative say-on-pay results related to Mercer's prediction of the say-on-pay vote based on Symantec's average TSR. That Mercer would use average TSR as a predicative measure for how shareholders might vote on Proposal 3 does not suggest that the data itself was material, particularly when Mercer predicted 80-90% approval on the vote *with* Symantec's average TSR. Finally, Mercer admitted that its estimate was uncertain because ISS would define its own peer group, and therefore, "ISS outcomes may vary from Mercer's estimate."[44] Given the low level of concern generated by the Mercer presentation, the likelihood of approval with Symantec's average TSR, and the uncertainty of the estimates, it is not substantially likely that disclosure of the comparative TSR information would have significantly altered the total mix of information available to the Symantec shareholders.

Finally, regarding the Committee's peer benchmarking analysis, the ACAC quotes from the Proxy, which states that Symantec's "general pay positioning strategy is to target the levels of base salary, annual short-term cash incentive structure and long-term incentive opportunities and benefits for our named executive officers with reference to the relevant market data for each position. The Compensation Committee may set the actual components for an individual named executive officer above or below the positioning benchmark based on factors such as experience, performance achieved, specific skills or competencies, the desired pay mix (e.g., emphasizing short- or long-term results), and our budget."[45] Plaintiff alleges that a shareholder would have believed that executive compensation is generally between the 50th and 65th percentile of Symantec's peer group, but in reality, several Symantec officers were receiving total direct compensation and/or salaries and/or long term incentive compensation above the 65th percentiles. Plaintiff alleges that without a fair summary of the peer benchmarking analysis, shareholders were unable to determine if executive compensation was being appropriately targeted and if executive salaries were properly aligned with the performance metrics described in the Proxy.

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[39] ACAC ¶ 34.
[40] ACAC ¶ 34.
[41] See Muck Exhs. 4 (Regulatory, Governance, & ISS Policy Update, Compensation Committee Meeting, January 23, 2012) and 5 (ISS Update, Compensation Committee Meeting, July 23, 2012).
[42] See Muck Exh. 4, SYMC000271.
[43] See Muck Exh. 4, SYMC000272.
[44] See Muck Exh. 4 at SYMC 271-272.
[45] See ACAC ¶ 35, citing Proxy at p. 38.

As the Amended Complaint concedes, the Proxy disclosed that the peer group and survey data were used "as a ***framework*** for making compensation decisions for each named officer's position" and that the Committee retained the discretion to "set the actual components for an individual named executive officer ***above or below*** the positioning benchmark based on factors such as experience, performance achieved, specific skills or competencies, the desired pay mix (e.g., emphasizing short- or long-term results), and our budget."[46] Given that the Proxy disclosed the Committee's discretion in this regard, as well as examples of the types of criteria (including but not limited to performance) that it could consider in setting the compensation for each individual executive, it is not substantially likely that disclosure of the fact that certain executives' compensation exceeded the peer group's 65th percentile would have significantly altered the total mix of information made available. Put another way, the undisclosed information (that some executives' pay exceeded the 65th percentile) is not in any way inconsistent with or otherwise significantly different from the disclosed information (that the Committee could set the actual pay above the positioning benchmark based on criteria other than performance). *Skeen* rejected the argument that in appraisal actions, directors must provide all of the information underlying a fairness opinion so that shareholders can make an independent determination of fairness. (*Skeen*, *supra*, 750 A.2d at p. 1174.) In the context of non-binding say-on-pay votes, there is no controlling authority that requires disclosure of underlying benchmarking data in order that shareholders may independently determine the propriety of how executive compensation was determined. Nor would such a duty of disclosure be consistent with Delaware law on materiality under the facts of this case where the Proxy adequately disclosed what the pay targets were based on, as well as the fact that compensation may be above the positioning benchmark based on consideration of factors other than performance.

For all of these reasons, the demurrer to the first cause of action for breach of fiduciary duty is **SUSTAINED**. Furthermore, because Plaintiff does not argue or show in what manner she can amend her pleading to state a sufficient direct disclosure claim under Delaware law, the demurrer is **SUSTAINED WITHOUT LEAVE TO AMEND**. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

Finally, because the ACAC fails to state a claim for breach of fiduciary duty against the Individual Defendants, the claim that Symantec aided and abetted any underlying breach of fiduciary duty also fails. (*Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.* (Del. Ch. 2006) 906 A.2d 168, 215.) Thus, the demurrer to the second cause of action for aiding and abetting is also **SUSTAINED WITHOUT LEAVE TO AMEND**.

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[46] Proxy at 38, emphasis added.

Calendar line 4

Case Name: *Fundamental Partners vs. Carl E. Berg, et al.*
Case No.: 1-12-CV-237054

This is a shareholder class action by plaintiff Fundamental Partners ("Plaintiff") on behalf of itself and other stockholders of Mission West Properties, Inc. ("Mission West") against Mission West, members of its Board of Directors (including Chairman of the Board/CEO Carl E. Berg ("Berg"), director/president and COO Raymond V. Marino, and directors William A. Hasler, Lawrence B. Helzel, and Martin S. Roher), Divco West Acquisitions LLC ("Divco"), TPG Capital L.P. ("TPG") and M West Holdings, LP ("M West"). The case arises out of a series of transactions culminating in the dissolution of Mission West. Plaintiff alleges the Berg Group used its control of Mission West to cause it to agree to the transactions in order to advance Berg Group's interests to detriment of Plaintiff and the other shareholders.

Pursuant to the proposed transaction, Mission West agreed to engage in a recapitalization of its six operating partnerships (Mission West Properties, L.P., Mission West Properties, L.P. I, Mission West Properties, L.P. II, Mission West Properties, L.P. III, Mission West Properties, L.P. IV, and Mission West, L.P. V) and then withdraw as the general partner. The limited partners of the operating partnerships would be given the option to exchange their limited partnership units for shares of Mission West common stock, and real estate assets held by the operating partnerships would be sold or transferred among them. Following the recapitalization, the non-party "Berg Group"[47] would hold 98.6% of the remaining operating partnership and properties with an enterprise value of $524.3 million. Thereafter, the "Buyer" (Divco, TPG and M West) would purchase assets representing substantially all of Mission West's assets, and Mission West will have transferred or disposed of substantially all of its assets and liquidate, resulting in a distribution to the shareholders of $9.20 to $9.28 per share.[48]

The Complaint, filed December 3, 2012, asserts causes of action for breach of fiduciary duty, failure to disclose, and aiding and abetting. Plaintiff alleges that Berg used his control of Mission West and its directors to breach their fiduciary duties by causing the proposed transactions, which were not in the best interests of the shareholders, but rather, were in the interests of Berg and the Berg Group to monetize their interests in order to pursue other investment endeavors.[49] Plaintiff further alleges that the Individual Defendants breached their fiduciary duties of disclosure in the November 27, 2012 Definitive Proxy Statement, which allegedly concealed certain material information regarding: (1) the conflicts of interest of the financial advisor, Stifel, Nicolaus & Co. ("Stifel Nicolaus") hired to render a fairness opinion; (2) the sale process; and (3) the criteria used by Stifel Nicolaus to render the fairness opinions.[50]

On December 5, 2012, Plaintiff filed an ex parte application for temporary restraining order in which Plaintiff sought orders temporarily restraining Defendants from consummating the

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[47] The Berg Group allegedly consists of Carl. E. Berg, Clyde J. Berg, Kara Ann Berg, Berg & Berg Enterprises, Inc., Berg & Berg Enterprises, LLC, 1981 Kara Ann Berg Trust, West Coast Venture Capital, Inc., the Carl and Mary Ann Berg Charitable Remainder Trust, the Clyde J. Berg 2011 Charitable Remainder Trust and the Kara Ann Berg 2011 Charitable Remainder Trust. (Compl. ¶ 16.)
[48] Compl. ¶ 1.
[49] Compl. ¶ 19.
[50] Compl. ¶ 21.

transactions and expedited discovery. Following arms-length negotiations, the parties reached an agreement in principle concerning the proposed settlement, set forth in a Memorandum of Understanding and formalized in the July 18, 2013 Stipulation.[51] On December 26, 2012, Mission West announced it had completed the Operating Partnership Recapitalization and Asset Sale and set December 28, 2012 as the record date for the liquidation.

In consideration for full settlement and release, Mission West agreed to disclose certain information in Definitive Additional Materials on Schedule 14A on December 10, 2012. These supplemental disclosures were as follows:

- Mission West's property level forecasts and projections, including unlevered free cash flow for the period 2013 through 2017;
- Information that Mission West agreed to pay Stifel Nicolaus an additional financial advisory fee of up to $500,000 under certain circumstances;
- Information concerning the methodologies underlying Stifel Nicolaus's fairness opinion that the consideration to be paid pursuant to the transactions was fair from a financial point of view;
- Information regarding discussions of the Independent Directors Committee regarding the fairness of the consideration received by Mission West's outside shareholders relative to the consideration to be received by Mr. Berg and other holders of limited partnership interests in the Company;
- Information regarding Mr. Berg's involvement in the sale process including (a) discussions between him and certain tenants of the properties regarding the potential purchase of such properties by the tenants; and (b) information regarding the dissemination of certain real estate valuations, performed by an outside real estate appraisal firm to Mission West after seeking approval from the Independent Directors Committee so that the outside real estate appraisal firm could ask questions of Mr. Berg.

Under the Stipulation, Mission West, its successors or its insurance carrier will cause to be paid to Plaintiff's counsel $550,000, and this amount will not affect the consideration paid to Mission West's stockholders in connection with the Merger.

The parties now move for preliminary approval of settlement, preliminary certification of a non-opt out class, approval of the class notice procedure, and the scheduling of a final approval hearing.

Discussion

"The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.' [Citations.] This list 'is not exhaustive and should be tailored to each case.'

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[51] A copy of the Stipulation is attached as Exhibit 1 to the Declaration of Blake Muir Harper ISO Joint Motion for Prelim. Approv.

[Citation.]" (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.) "[A] presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. [Citation.]" (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.)

If the factual statements in the papers are credited, the settlement is entitled to a presumption of fairness. According to the brief and Stipulation, the parties engaged in arm's-length bargaining, Mission West produced documents to Plaintiff's counsel, including relevant Board minutes and bankers books, and Plaintiff took the depositions of Hasler on April 11, 2013, and Chad M. Gorsuch (representative of one of Mission West's advisors) on May 23, 2013. Plaintiff's counsel submits copies of the firm resumes of The Brualdi Law Firm, P.C. and Hulett Harper Stewart, LLP demonstrating counsel's experience in similar litigation.[52]

"Although [t]here is usually an initial presumption of fairness when a proposed class settlement … was negotiated at arm's length by counsel for the class, … it is clear that the court should not give rubber-stamp approval. Rather, to protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished. To make this determination, the factual record before the … court must be sufficiently developed… . The proposed settlement cannot be judged without reference to the strength of plaintiffs' claims. The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. The court must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case, but nonetheless it must eschew any rubber stamp approval in favor of an independent evaluation." (*Kullar*, *supra*, 168 Cal.App.4th at p. 130, internal citations and quotation marks omitted.)

Here, there was no monetary settlement amount, but the supplemental disclosures allowed the shareholder vote to be based on complete information about the real and potential conflicts of Mr. Berg and Stifel Nicolaus, the company's financial advisor, as well as the company's future prospects. These were real and substantial benefits to the shareholders. (See *In re Netsmart Techs. Inc. S'holders Litig.* (Del. Ch. 2007) 924 A.2d 171, 203 [importance of future cash flows]; *In re Del Monte Foods Co. S'holders Litig.* (Del. Ch. 2011) 25 A.3d 813, 832 [disclosure of financial advisor's potential conflicts]; *In re Netsmart*, *supra*, 924 A.2d at pp. 203-204 [disclosure of valuation methods used for fairness opinion]; *Matador Capital Mgmt. Corp. v. BRC Holdings* (Del. Ch. 1998) 729 A.2d 280, 295 [disclosure of information by directors recommending transaction]; *Eisenberg v. Chicago Milwaukee Corp.* (Del. Ch. 1987) 537 A.2d 1051, 1061 [disclosure of self-interest].) Regarding the strength of Plaintiff's case on the merits, Plaintiff acknowledges that attempts to preclude consummating the proposals and obtain a higher price would have been significantly more difficult to prove than the disclosure claim because of the presumption of the business judgment rule, and efforts to obtain a preliminary injunction would have been difficult and expensive.

Regarding attorney's fees, it is noted that a finding that a class action settlement is fair "is not dispositive of the attorney fees issue." (*Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 129.) A court has an independent right and responsibility to

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[52] See Harper Exhs. 3-4.

review the attorney fee provision of the settlement agreement and award only so much as it determines reasonable. (*Id*. at pp. 127-128.) "Even where the parties agree as to the amount of attorney fees in such a settlement agreement, courts properly review and modify the agreed upon fees if the amount is not reasonable." (*Id.*) Here, the Court will grant preliminary approval of the fee award, subject to final approval based on billing records submitted prior to the final fairness hearing. (See *Lealao v. Beneficial Cal. Inc.* (2000) 82 Cal.App.4th 19, 46-47 [discussing lodestar cross-check].)

Plaintiff moves to certify a non-opt out settlement class. Under California Rules of Court, rule 3.769(c) and (d), the Court has discretion to order certification of a provisional settlement class after the preliminary settlement hearing. California Code of Civil Procedure Section 382 governs the certification of a class in California and sets forth two requirements: "(1) There must be an ascertainable class; and (2) there must be a well-defined community of interest in the question of law and fact involved affecting the parties to be represented." (*Daar v. Yellow Cab* (1967) 67 Cal.2d 695, 704.) To clarify the "community-of-interest" standard, the California Supreme Court has used language from Rule 23 of the Federal Rules of Civil Procedure, in stating the requirements as follows; "(1) predominant questions of law or fact; (2) class representation with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class." (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 470.)

Ascertainable Class: "The trial court must determine whether the class is ascertainable by examining (1) the class definition, (2) the size of the class and (3) the means of identifying class members." (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) "Class members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932.) Here, the class members are easily ascertainable by reference to Mission West's records for its shareholders during the relevant class period.

Numerousity: The numerosity requirement is met if the class is so large that joinder of all members would be impracticable. (See *Richmond, supra*, 29 Cal.3d at p. 470.) Here, Plaintiff submits that as of February 29, 2012, there were over 22 million shares of Mission West stock outstanding held by 130 shareholders of record.

Predominant Questions of Fact and Law: "A class may be certified when common questions of law and fact predominate over individualized questions. [Citation.] As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages. [Citation.]" (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.) There is little doubt that all of the common shareholders of Mission West share a community of interest under the facts of this case and that predominant common questions of law and fact would have predominated this litigation as Defendants owed fiduciary duties to all of the shareholders in connection with the proposed transaction, and their liability, if any, would likely have been subject to common proof.

Typicality: A class representative's claim must be "typical" but not necessarily identical to the claims of other class members. It is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. (See *Classen v. Weller* (1983) 145 Cal.App.3d 27, 45.) Plaintiff's claims appear to be typical of the class, as

they are all Mission West shareholders contesting the proposed transaction for the same reasons.

Adequate Representation: "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Crocker-Citizens Nat. Bank* (1976) 60 Cal.App.3d 442, 450.) As discussed above, Plaintiff's counsel's submits evidence of its experience in similar litigation. There is no reason to believe that Plaintiff has any special defenses or interests that would render its interest antagonistic to the rest of the Mission West shareholder class.

Regarding non-opt out settlement classes, in *Bell v. Am. Title Ins. Co.* (1991) 226 Cal.App.3d 1589, the Court of Appeal held that California trial courts may approve non-opt-out class action settlements if the prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct, and whenever the case was predominantly for injunctive relief. Here, non-opt-out certification is appropriate because the settlement agreed upon certain disclosures to shareholders in connection with the proposed transaction, and a potential opt-out could seek to require additional or different disclosures, in contravention of the settlement. Thus, an opt-out could subject Defendants to inconsistent standards of conduct.

For these reasons, the Court provisionally certifies, for settlement purposes only, a non-opt out Class consisting of all persons or entities who owned Mission West common stock on November 2, 2012, and all of their successors in interest and transferees, immediate and remote, through and including December 28, 2012, but not Defendants and persons or entities related to or affiliated with Defendants.

Regarding class notice, the manner of notice is direct mailing to each class member. The notice, Exhibit B to the Stipulation, complies in all relevant respects with California Rules of Court, rule 3.766. It provides a brief explanation of the case, the basic contentions or denials of the parties, and statements regarding the binding effect of the judgment, and appearance through counsel. (See Cal. Rules of Court, rule 3.766(d).) The proposed notice procedure (individualized mailing) is reasonably calculated to give due notice to the class.

For all of these reasons, the motion for preliminary approval of class action settlement is **GRANTED**. The final approval hearing shall be held on **October 25, 2013** at 9:00 a.m. in Department 1.

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